STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHRISTIAN JOHN, Charging Party, v. CALIFORNIA UNION OF SAFETY EMPLOYEES, Respondent.	)	Case No. S-CO-128-S PERB Decision No. 1064-S November 1, 1994

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by William A. Sokol, Attorney, for Christian John; Sam A. McCall, Jr., Chief Legal Counsel, for California Union of Safety Employees.

Before Blair, Chair; Caffrey, Carlyle, Garcia and Johnson, Members.

DECISION

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Union of Safety Employees (CAUSE) of a proposed decision of an administrative law judge (ALJ). The ALJ found that CAUSE violated section 3519.5(b) of the Ralph C. Dills Act (Dills Act)[1]

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519.5 states, in pertinent part:

> It shall be unlawful for an employee organization to:
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> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

by breaching its duty of fair representation when it withdrew its representation of Christian John (John) in proceedings before the State Personnel Board (SPB).

The Board has reviewed the entire record in this case, including the proposed decision, transcript, exhibits, CAUSE'S statement of exceptions and John's response thereto. The Board has also considered the informational briefs filed by interested parties.[2] The Board affirms in part and reverses in part the conclusions of the ALJ in accordance with the following discussion.

FACTUAL SUMMARY

John has been employed, since 1976, by the Department of Parks and Recreation (DPR) as a lifeguard. He is a member of CAUSE, which is the exclusive representative of state bargaining Unit 7 (Unit 7).

In the fall of 1990, during a background investigation on another employee who had applied for a promotion, John provided written and oral statements concerning that employee to a DPR investigator. DPR believed that some of the information John provided was false, thus it initiated an internal affairs investigation concerning the matter.

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[2]The California School Employees Association, California State Employees Association and the California Department of Forestry Employees Association sought and were granted permission to file informational briefs in this case. These briefs generally addressed the ALJ's application of Lane v. I.U.O.E. Stationary Engineers (1989) 212 Cal.App.3d 164 [260 Cal.Rptr. 634] (Lane).

John first met with Robert McCann (McCann), CAUSE legal counsel, the first week in September 1990, when he entered CAUSE'S office accompanied by a private attorney. John asked CAUSE to permit his attorney to represent him in the internal affairs investigation. McCann told John that CAUSE would not pay for an outside attorney, but that it was willing to represent John itself. John agreed to this arrangement.

McCann represented John at DPR's internal affairs investigation on September 9, 1990. On November 2, 1990, John was informed that a "finding of failure of good behavior and dishonesty" had been sustained against him. No formal adverse action was taken at that time. On November 30, 1990, McCann filed an appeal with SPB concerning this finding.

On April 9, 1991, John received a Notice of Termination from DPR. This notice was based on the same facts that supported the November finding. On April 11, 1991, John met with McCann and Sam McCall (McCall), CAUSE'S chief legal counsel, to discuss his case.

The first 45 minutes of the meeting were spent on the merits of John's appeal. McCann explained that statements made on a confidential questionnaire filled out during the employment process for another employee were "absolutely privileged" and that DPR was precluded from disciplining an employee for such statements. He gave John a copy of a decision on the subject and told him not to worry.

During the latter part of the meeting, McCall asked John about his involvement with the California State Peace Officers Association (CSPOA), a labor organization which was attempting to decertify CAUSE as the exclusive representative for Unit 7. McCall was aware, in November 1990, that Michael Lynch, an official of CSPOA, identified John as a member of CSPOA's board of directors. In addition, McCann testified he had seen John's name listed as a member of CSPOA's board of directors on its campaign literature.

John explained that when he was asked about his membership on the CSPOA board of directors, he told McCall that his contact with the organization was very informal. It consisted of attending three meetings in 1988 or 1989, and that he had no current involvement with the organization. He testified he was not involved with CSPOA's effort to decertify CAUSE and that, to his knowledge, he had never been a member of the board of directors or held any other position with CSPOA.

McCann, on the other hand, testified John responded to McCall's questions by stating that he was a current member of the board of directors, but he had signed up for that position simply to fill a slot. McCall advised John that CAUSE might not continue to represent him because his "dual unionism" and membership in a rival union's board of directors created a conflict of interest for CAUSE.

The meeting concluded when McCall told John that

continued representation would be determined by CAUSE'S Labor Representation Committee (LRC), which was scheduled to meet at a future date. John told McCann and McCall that he wished to attend the LRC meeting and speak on his own behalf.

McCann also told John that CAUSE would file a second appeal with SPB concerning his Notice of Termination from DPR. McCann filed the appeal the same day. The form which it used to file the appeal did not state that it would represent the appellant, although it did ask SPB to direct all future appeal information and documents to CAUSE'S office.

On April 30, 1991, a letter was sent to John informing him of the time and location of the May 8 LRC meeting. The letter was misaddressed and John stated he never received the letter and was not informed in any other manner of the date of the meeting.

McCall attended the LRC meeting and presented the positions of both CAUSE and John. McCall stated the case was "winnable," but recommended that, if the committee accepted the case, it be referred to outside counsel due to a conflict of interest with CAUSE.

After a 20-minute discussion, the LRC unanimously voted to deny representation to John with regard to his SPB appeals. The chairman of the LRC, Marcel Nadeau (Nadeau), testified the committee was told that John's case was "winnable." Nadeau stated that representation for John would not have been terminated had he not been involved with CSPOA. Nadeau believed CAUSE would be criticized for not doing an adequate job if it

unsuccessfully handled John's appeal. He further explained that if CAUSE selected outside counsel, it would be subject to the same criticism, and if John was allowed to select an attorney, CAUSE would have no control over the cost.

On May 9, 1991, John called CAUSE to determine when the LRC meeting was going to be held. John was informed that the LRC had met the previous day and had voted to deny him representation. In a letter to John, dated May 9, 1991, McCall reported the decision of the LRC. This letter was also misaddressed; however, John stated he received this letter. The letter stated, in pertinent part:

> The reason for this decision is your dual union activities while sitting on the Board of Directors of CSPOA, an organization which has recently tried to destroy CAUSE through a decertification election. CAUSE sees dual unionism as a conflict of interest.

John was also informed of his right to appeal this decision to the CAUSE executive board. John did not utilize the CAUSE appeal procedure.

John retained a private attorney to represent him before the SPB and paid him a $750 retainer. He later retained another attorney and paid him $2,500 to represent him in his SPB appeals. Eventually, the two appeals were heard, the determination was reversed and John was reinstated as a lifeguard at Folsom Lake.

On June 26, 1991, John filed the instant unfair practice charge with PERB alleging that CAUSE'S refusal to represent him before the SPB was reprisal against him based on CAUSE'S belief that John was a member of the board of directors of a rival

employee organization. On July 25, 1991, PERB's general counsel issued a complaint alleging that CAUSE'S refusal to represent John before the SPB was in retaliation for his participation in a rival employee organization.

ALJ'S PROPOSED DECISION

The ALJ considered whether CAUSE, by its actions, violated its duty of fair representation to John. The ALJ found that CAUSE'S failure to effectively notify John of the May 8 LRC meeting when it incorrectly addressed the letter sent to John, did not violate its duty of fair representation. The Board concurs in this finding.

Concerning CAUSE'S refusal to represent John before the SPB, the ALJ acknowledged that an exclusive representative has no duty of fair representation under the Dills Act when representing a unit member in a forum which has no connection with collective bargaining. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) However, relying on Lane, the ALJ determined that, when a union voluntarily undertakes representation in forums outside of collective bargaining, "the union must maintain the same standard of care it does with regard to its statutory duties" (i.e., a duty "akin" to the duty of fair representation). The ALJ concluded that under this standard, CAUSE violated the duty of fair representation when it refused to represent John before the SPB.[3] The ALJ dismissed CAUSE'S

[3]Finding a violation under this theory, the ALJ did not determine whether CAUSE discriminated against John in violation of Dills Act section 3519.5(b). However, the record establishes

argument that its actions were consistent with a union's right to self-preservation against disloyal members.

CAUSE'S EXCEPTIONS

CAUSE excepts generally to the ALJ's finding that CAUSE breached its duty to fairly represent John before the SPB. CAUSE argues there was no agreement to represent John before the SPB; therefore, the ALJ's application of Lane is misplaced. CAUSE also denies that its refusal to represent John was due to "dual unionism." Rather, CAUSE asserts that John's involvement with the rival union created a conflict of interest which precluded CAUSE from representing him before the SPB. Relying on Anderson v. Los Angeles County Employee Relations Com. (1991) 229 Cal.App.3d 817 [280 Cal.Rptr. 415] (Anderson), CAUSE argues that "sitting as a member of a rival union's Board of Directors" is not protected activity under the Dills Act because CAUSE has a "competing and more compelling right of self preservation." Therefore, CAUSE contends the ALJ erred in finding "John was engaged in protected activity and that the denial of representation was a breach of the duty of fair representation in reprisal for John's activity."

DISCUSSION

Duty of Fair Representation

Although the Dills Act does not specifically provide for an employee organization's duty of fair representation, the Board

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that the parties were on notice of the discrimination theory and fully litigated the issue.

has inferred such a duty from the fact that the Dills Act provides for exclusive representation.[4] (California State Employees' Association (Lemmons, et al.) (1985) PERB Decision No. 545-S.)

This duty of fair representation requires an exclusive representative to fairly and impartially represent all employees in the bargaining unit. The duty is breached when the exclusive representative's conduct toward a unit member is arbitrary, discriminatory or in bad faith. (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.) However, no duty of fair representation is owed to a unit member unless the exclusive representative possesses the exclusive means by which an employee can obtain a particular remedy. (California Faculty Association (Pomerantsev) (1988) PERB Decision No. 698-H; San Francisco Classroom Teachers Association. CTA/NEA (Chestangue) (1985) PERB Decision No. 544.)

The duty of fair representation does not apply to an exclusive representative which represents a bargaining unit member before the SPB because that forum is not connected with any aspect of negotiation or administration of a collective bargaining agreement and the exclusive representative does not exclusively control the means to the particular remedy. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) Therefore, because it had no obligation to

[4]A duty of fair representation also arises under the Dills Act for employees who pay fair share fees. (Dills Act, sec. 3515.7(g).) This section is clearly not applicable in this case.

represent John before the SPB, CAUSE did not violate the Dills Act duty of fair representation when it refused to represent him in that forum.

The ALJ determined that when a union voluntarily undertakes representation in a forum unconnected to negotiation or administration of a collective bargaining agreement, Lane imposes on the union a standard of care equivalent to the duty of fair representation. The ALJ concluded that under this Lane extra-contractual duty of fair representation, CAUSE discriminated against John when it decided not to represent him before the SPB.

In Lane, the court applied a standard of care "akin" to a duty of fair representation only after the union had affirmatively undertaken representation in a forum where representation by the union was not mandatory. In the present case, after meeting with McCann and McCall to discuss the merits of his case, John was informed that the LRC would decide whether CAUSE would represent him before the SPB. McCann advised John that due to the filing deadlines, a notice of appeal concerning his termination would be filed with the SPB in order to preserve his right to appeal. McCann took this action because he was concerned that the LRC would not have an opportunity to meet before the deadline to appeal John's termination.

It is clear that CAUSE did not undertake John's representation before the SPB. Rather, CAUSE filed the notice of appeal to preserve John's right to appeal his termination while it decided whether it would represent him in his appeal. It is

apparent that John was aware the LRC would determine whether CAUSE would represent him before the SPB because he asked to attend the meeting to present his case. Therefore, a Lane standard of care is inapplicable in this case.[5]

CAUSE did not breach its duty of fair representation by refusing to represent John before the SPB. However, the inquiry does not end there. The Board will also inquire into whether CAUSE unlawfully discriminated or retaliated against John.

Discrimination/Retaliation

Dills Act section 3519.5(b) prohibits discrimination or retaliation by an employee organization against an employee for engaging in conduct protected by the Dills Act. In California State Employees' Association (O'Connell) (1989) PERB Decision No. 753-H, the Board stated:

> An inquiry must go forth under Carlsbad Unified School District (1979) PERB Decision No. 89 and/or Novato Unified School District (1982) PERB Decision No. 210, as to whether the actions were motivated by a charging party's exercise of protected rights.
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> (Pp. 9-10; emphasis in original.)

In State of California (Department of Developmental Services) (Monsoor) (1982) PERB Decision No. 228-S, the Board applied the test for resolving allegations of discrimination set out in Novato Unified School District (1982) PERB Decision No. 210 (Novato) to charges filed under the Dills Act. The Board has also found the standard applied to cases involving employer

[5]The Board finds it unnecessary in this case to determine whether a Lane duty of fair representation attaches to union representation in extra-contractual services.

misconduct to be appropriate in cases involving employee organization discrimination. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S.)

In order to establish a violation of section 3519.5(b) under Novato, the charging party bears the burden of showing he engaged in protected activity; the respondent knew of his participation in protected activity; and the respondent took adverse action motivated by that activity. (Carlsbad Unified School District (1979) PERB Decision No. 89.) Proof of a connection or nexus between the protected activity and the adverse action may be established by direct or circumstantial evidence and inferences drawn from the record as a whole. (Livingston Union School District (1992) PERB Decision No. 965.) Once this is established, the burden shifts to the respondent to demonstrate it would have taken the same action regardless of the protected conduct. (Novato.)

An employee engages in activity which is protected by the Dills Act when he forms, joins or participates in the activities of an employee organization.[6] John testified he attended three meetings of CSPOA, a rival employee organization. John also testified, when asked about his involvement with CSPOA on April 11, that he informed McCann and McCall of his attendance at these meetings. At a minimum, John established that he participated in protected activity when he attended the meetings

[6]Dills Act section 3515.

of a rival employee organization.[7] CAUSE had knowledge of John's protected activity when John disclosed his attendance. Further, CAUSE acknowledged John's "dual union activities" in its letter reporting the results of the LRC meeting.

After convening a meeting of the LRC, CAUSE decided to deny representation to John because of his involvement with CSPOA. CAUSE'S refusal to represent John under these circumstances was adverse to his interests.

In this case, the connection between John's protected activity and CAUSE'S adverse action is clearly established. Nadeau testified that CAUSE would not have terminated its representation of John had he not been involved with CSPOA. McCall's letter reporting the LRC's decision stated that the reason for denial of representation was because of John's "dual union activities while sitting on the Board of Directors of CSPOA, an organization which has recently tried to destroy CAUSE through a decertification election." Thus, CAUSE admitted John was denied representation because of his protected activity.

In response, CAUSE argues that John's involvement with the rival union created a conflict of interest which precluded CAUSE

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[7]CAUSE disputes John's degree of involvement with CSPOA asserting that John admitted he was an active member of CSPOA's board of directors. However, what is controlling is CAUSE'S belief that John was involved with CSPOA and that his involvement was the reason for denying representation to John. Where a prohibited motive is found, it is not controlling that the employer may have been mistaken in determining whether the individual was engaged in protected activity or was a union supporter. (Pleasant View Rest Home (1971) 194 NLRB 426 [78 LRRM 1683]; NLRB v. Link-Belt Co. (1941) 311 U.S. 584 [7 LRRM 297].)

from representing him before the SPB. Citing Anderson, CAUSE contends that "sitting as a member of a rival union's Board of Directors" is not protected activity under the Dills Act because CAUSE has a more compelling right of self-preservation.

The Board is authorized to inquire into the internal activities of an employee organization when it is alleged the organization has imposed reprisals on employees because of their protected activities. (California State Employees' Association (O'Connell) (1989) PERB Decision No. 753-H; United Teachers Los Angeles (Malin) (1991) PERB Decision No. 870.)

In California State Employees Association (Garcia) (1993) PERB Decision No. 1014-S, the Board stated that certain actions taken by a union may be reasonable where they are motivated by self-preservation rather than retaliation. The Board has upheld an exclusive representative's self-preservation right to expel from membership a union president who actively pursued the decertification of his own union. (California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280; California School Employees Association, Chapter 318 (Harmening) (1984) PERB Decision No. 442.) Similarly, in Anderson, under the Meyers-Milias-Brown Act, a unit member who served as a worksite representative was expelled and refused reinstatement to the union after he formed a rival union and unsuccessfully sought to decertify the exclusive representative.

These cases represent a self-preservation exception to a

much broader rule which prohibits an employee organization from discriminating or retaliating against an employee for engaging in conduct protected by the Dills Act. They are distinguishable from the present case for several reasons. First, these cases address the employees' membership status after playing a pivotal or leadership role in a rival union's decertification effort. Here, John's membership in the union is not in question. John was a member of CAUSE and continued to be a member during the period CAUSE considered whether it would represent him. Furthermore, there is no evidence in the record which indicates that John participated in decertification activities. Second, the policy supporting an exclusive representative's self-preservation rights in these cases involved the union's ability to eliminate further internal attempts to destabilize the union. That is not the situation in the present case. There are no facts to establish how refusing to represent John would enhance CAUSE'S ability to protect itself against a decertification attempt. CAUSE'S conduct in refusing to represent John was not indicative of self-preservation. Rather, CAUSE sought to penalize John for his protected activities. Such action is not excused under the self-preservation exception. Accordingly, CAUSE'S argument is rejected.

In conclusion, CAUSE'S refusal to represent John in the SPB hearing is found to be in retaliation for John's involvement with CSPOA and, therefore, unlawful in violation of Dills Act section 3519.5(b).

REMEDY

The Board is authorized to remedy violations of the Dills Act. Section 3514.5(c) grants the Board the power to:

> . . . issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In order to remedy the unfair practices of CAUSE and to prevent it from benefiting from its unfair labor practice, and to effectuate the purposes of the Dills Act, it is appropriate to order CAUSE to cease and desist from discriminating against John.

Since the SPB hearing has already been held, there is no point in ordering CAUSE to provide representation. However, inasmuch as John obtained and paid for outside counsel, he can be made whole by an order directing CAUSE to reimburse him for all reasonable expenses incurred by him for his representation before the SPB.

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the California Union of Safety Employees (CAUSE) violated section 3519.5(b) of the Ralph C. Dills Act (Dills Act). CAUSE violated the Dills Act by discriminating against Christian John (John) when it refused to represent him before the State Personnel Board (SPB).

Pursuant to section 3514.5(c) of the Dills Act, it is hereby

ORDERED that CAUSE, its chief executive officer and its representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminating against John in retaliation for his exercise of rights guaranteed him by the Dills Act,

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Reimburse John for all reasonable expenses incurred by him for his representation before the SPB.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CAUSE, indicating that CAUSE will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, defaced, altered or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Members Caffrey and Johnson joined in this Decision.
Member Carlyle's concurrence and dissent begins on page 18.
Member Garcia's concurrence and dissent begins on page 28.

CARLYLE, Member, concurring and dissenting: I concur with the majority's reversal of the administrative law judge and the holding that the California Union of Safety Employees (CAUSE) did not breach its duty of fair representation by refusing to represent Christian John (John) in proceedings before the State Personnel Board (SPB). I dissent from the majority's departure from established policy of the Public Employment Relations Board (PERB or Board) and federal precedent to nonetheless hold that even though there was no duty of fair representation, CAUSE is still liable for failing to represent John under a retaliation theory.

To completely understand and, more importantly, fully appreciate the ramifications of the majority view that CAUSE is liable for failing to represent John even though there was no duty to represent, it is necessary to briefly review the origins and history of the doctrine of this duty of fair representation.

The duty of fair representation is imposed on an employee organization which, under statutory authority, has become the exclusive representative of employees in a bargaining unit and therefore, exclusively bargains with an employer and administers the resultant collective bargaining agreement. The duty of fair representation was first recognized and established by the courts and, as a result, in the private sector labor relations field. The duty is enforceable in the courts through a civil cause of action for injunction, damages and other appropriate relief.

The courts have held that the union owes no duty to advise employees of their legal rights outside the context of the collective bargaining agreement. (Hawkins v. Babcock & Wilcox Co. (1980) 105 LRRM 3438.) In other words, outside of the employer-employee relationship, the union has no authority (absent consent of the member) to represent union members nor does it owe the,duty to advise those members of their extra-contractual legal rights.

In American Federation of Government Employees v. DeGrio (1984) 454 So.2d 632 [116 LRRM 3298, 3300-3301], the court held that the union had no duty of fair representation to a nonmember under federal labor policy when the union voluntarily represented him in a discharge case. However, the court added that the union did have the duty to exercise due care in its representation of the employee under common law of negligence.

In 1962, the National Labor Relations Board (NLRB) held that unions acquiring an exclusive representative status under the National Labor Relations Act (NLRA) have a duty of fair representation and that a breach of the duty constitutes an unfair labor practice under the NLRA and is actionable before the NLRB. (Miranda Fuel Co. (1962) 140 NLRB 181 [51 LRRM 1584] enforcement den. (2d Cir. 1963) 326 F.2d 172 [54 LRRM 2715].)

In the public sector, under the Educational Employment Relations Act (EERA),[1] unions have a duty of fair representation to all bargaining unit employees (EERA section 3544.9).

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[1]EERA is codified at Government Code section 3541 et seq.

Likewise, in the Higher Education Employer-Employee Relations Act (HEERA),[2] unions also have the duty to fairly represent all bargaining unit employees (HEERA section 3571.l(e)). However, under the Dills Act[3] where there is no express statutory language concerning the duty of fair representation, PERB has imputed the duty and has held that failure by a union to comply with this duty would constitute a violation of Dills Act section 3519.5(b). (California State Employees' Association (Lemmons and Lund) (1985) PERB Decision No. 545-S.)

PERB cases have held that the duty of fair representation evolves out of the exclusive representative's duty to represent each and every unit member, regardless of membership status, in actions that arise out of the obligation of collective bargaining, specifically negotiation and administration of a collective bargaining agreement. (California State Employees Association (Parisi) (1989) PERB Decision No. 733-S.) To demonstrate a breach of the duty of fair representation, the charging party must show that the exclusive representative failed or refused to provide representation to the employee for arbitrary, discriminatory, or bad faith reasons. (United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258; Service Employees International Union. Local 99 (Kimmett) (1979) PERB Decision No. 106.)

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[2]HEERA is codified at Government Code section 3560 et seq.

[3]The Dills Act is codified at Government Code section 3512 et seq.

However, the threshold issue is to first determine whether the matter for which the employee requests representation is one to which the duty of fair representation attaches. The **Board has** previously construed the duty of fair representation as being limited to negotiation and enforcement of the terms of the collective bargaining agreement. (Id.) Further, the Board has specifically held that proceedings of the SPB are "extra-contractual" in nature, and hence, not ones to which the duty of fair representation attaches. (American Federation of State. County and Municipal Employees. Local 2620 (Moore) (1988) PERB Decision No. 683-S; California Correctional Peace Officers Association (Pacillas) (1987) PERB Decision No. 657-S; California State Employees Association (Parisi). supra. PERB Decision No. 733-S.) The right of State employees to appear before the SPB is an individual right granted by the California Constitution, not one arising from the collective bargaining agreement. (Id.)

As the duty of fair representation is limited to contractually based remedies under the union's exclusive control, the Board has affirmed dismissal of charges based upon alleged union failures to pursue noncontractual administrative or judicial relief (Service Employees International Union. Local 99 (Kimmett). supra, PERB Decision No. 106), or on allegations of inadequate representation in such noncontractual settings. Since employees can retain private counsel for representation in these types of noncontractual forums, the union's refusal does not bar

them from seeking redress on his or her own. (California State Employees' Association (Darzins) (1985) PERB Decision No. 546-S.)

The facts of this case clearly demonstrate that John has not overcome the threshold showing of an owing of a duty of fair representation under the collective bargaining agreement. Without any more, the Board is without jurisdiction to hear this case. Although John may have another forum to seek redress to his claim, that forum is not found at PERB.

John recognized this limitation on the duty of fair representation by arguing that the duty attached only when CAUSE allegedly agreed to represent John in front of the SPB. John appears to have argued that had CAUSE initially declined representation to him for his appeal, it would not have breached its statutory duty of representation. But, because CAUSE did file an appeal with the SPB, John asserts that CAUSE had a duty to represent him in a fair and impartial manner.[4] Presumably, this fiduciary duty springs from John's membership in CAUSE and

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[4]To the extent that the charge can be read to claim that CAUSE took a reprisal against John for engaging in protected activity, PERB has the statutory authority to inquire into the internal activities of the employee organization. But PERB's inquiry is limited (subject to the exception of where the internal activities of an employee organization have such a substantial impact on the employees' relationship with their employer as to give rise to the duty of fair representation) to examining conduct that arises out of the employee organization's obligations of collective bargaining, specifically negotiation and administration of a collective bargaining agreement. The right of an employee to appear before the SPB is an individual right, not connected with any aspect of negotiating or administering the collective bargaining agreement.

comes from his payment of dues to CAUSE for various services, including representation at adverse action hearings in front of various state agencies. Accordingly, John relies heavily on Lane v. I.O.U.E. Stationary Engineers (1989) 212 Cal.App.3d 164 [260 Cal.Rptr.634] (Lane).

According to Lane, a union may not have the obligation to represent an employee in a forum unrelated to the union's position as exclusive representative (e.g., a civil service hearing), but if the union does undertake such representation voluntarily, it is held to a standard of care equivalent to the duty of fair representation. In the Lane case, the court permitted the plaintiff to amend his complaint to allege that the union's actions were arbitrary, discriminatory, or in bad faith. What is not resolved by Lane (as it arose under the Meyers-Milias-Brown Act) is whether, even applying this standard of care, PERB has jurisdiction to hear this type of dispute as an unfair labor practice, or whether this standard of care is only to be applied by courts. The court set this standard of care because it was the "equivalent" to the duty of fair representation, but it did not specifically rule that failure by the union to meet the standard was a breach of the duty of fair representation.

PERB's jurisdiction is limited to the examination of CAUSE'S role as an exclusive representative, and the Board cannot pass judgement on CAUSE'S duties which may arise by virtue of its alleged fiduciary duty to its members outside the exclusive

representation setting. Regardless of membership status or the reasons given for not representing John, PERB is without jurisdiction to hold CAUSE to the Lane standard of care.

However, assuming arguendo that PERB had jurisdiction over this matter, I would find that the previous action of CAUSE on John's behalf by the filing of an appeal to preserve his right before the SPB is a ministerial act and does not obligate CAUSE to continue representation. I am unpersuaded that the action taken by CAUSE is sufficient to constitute a voluntary undertaking as in the Lane case.

Additionally, John was made well aware of the possibility that CAUSE may not handle his appeal. In an April 11, 1991 letter to John, CAUSE wrote in what appears to be a standardized letter:

> Because an appeal from an adverse action must normally be filed within twenty (20) days of the action being served upon the employee, the California Union of Safety Employees (CAUSE) has filed an appeal on your behalf with the State Personnel Board.
>
> A legal representative will be contacting you to gather information about your case. Should just cause be found to proceed as your representative, CAUSE will need and expect your full cooperation in the preparation of your case for the appeal hearing.
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> Should you have any questions in the meantime, please feel free to contact the CAUSE office.
> (Emphasis added.)

Further, John was informed that the CAUSE Labor Relations Committee would meet to discuss his and other cases. In a May 9,

1991 letter, John was made aware of the committee's denial for representation. The letter also stated, in part:

> As you know, your case is set for hearing before the State Personnel Board on June 6, 1991. If you wish representation, you are urged to retain your own attorney at your expense. You, of course, can represent yourself if you wish. You also have the option of asking for a continuance in order to allow for more time to prepare your case.

To attach a duty of fair representation to this case would do harm to the relationship of an employee organization and its members. CAUSE was attempting to provide a service to ensure that John would be able to pursue his action before the SPB. CAUSE'S letter clearly states that the appeal to the SPB was filed solely to preserve his rights pending its decision to grant representation. John was given notice that CAUSE may not accept his case. Under PERB case law and statutes, CAUSE did not breach its duty of fair representation.

Given the history of PERB case law and of federal cases in this area of the duty of fair representation, one would think that when the majority in this case also concludes that CAUSE did not breach its duty of fair representation, this case is over. Instead, the nightmare on 18th street has just started or, in the words of the majority: "The Board will also inquire into whether CAUSE unlawfully discriminated or retaliated against John."

The majority's interpretation and application of Dills Act section 3519.5(b) is wrong. Discrimination/retaliation is not the ends, but the means. Discrimination/retaliation is the

theory. It is the theory to prove motive. It is the theory to prove bad motive. It is the theory to prove bad motive for the actions taken against someone.

In each of the thirteen cases cited and relied upon by the majority in its discussion, the respondent had affirmatively undertaken an act or action which resulted in the discrimination or retaliation allegation and, most importantly, said eventual finding by the Board of such violative activity in those cases where the affirmative facts warranted it. In no case was the "act" or "action" complained of solely one of refusing to do something that one was under no obligation (by word or deed) to do in the first place. Simply put, there is no case authority to support the view of the majority on this point.

Look at the result: A union is under no obligation to represent one of its members before the State Personnel Board. That forum is extra-contractual (sound familiar?). The union has done nothing to obligate itself to represent said member. Despite the history of PERB case law and federal law on the duty of fair representation, the majority holds the union nonetheless liable under PERB law for its refusal to represent a member in an extra-contractual forum when it had no legal obligation to do so.

No obligation means no obligation. No duty means no duty. This is a first: Finding a union liable under PERB law for discriminating/retaliating against a member for saying "no" when there is absolutely no contract, obligation, duty, requirement, etc. to say "yes"; finding a union liable under PERB law for

discriminating/retaliating against a member for doing nothing when there is absolutely no contract, obligation, duty, requirement, etc. to do anything.

The majority may not like why CAUSE did what it did, but too bad. PERB is not the universal forum to solve all ills, real or imaginary. We should be here to properly apply the laws over which we have jurisdiction, not to create violations just because we don't like what was done or how it was carried out. Our likes and dislikes should not be the standard by which we decide cases.

As if the majority's view wasn't bad enough, can one imagine what will happen should the two in the majority eventually weigh in on the side of the third as set forth in his lead opinion in Los Angeles Unified School District (1994) PERB Decision No. 1061? Should that future phenomenon occur, these two cases would stand for the following:

> The union is under no duty of fair representation to represent a member before the State Personnel Board, but refusal to do so could lead to a finding by PERB of violating the Dills Act due to discrimination or retaliation. Should the union, in an attempt to conserve its time and resources, decide to undertake such an extra-contractual representation, PERB will not assist it in getting relevant materials or documents for its case from a recalcitrant employer because said undertaking is not in furtherance of "contract administration." Beautiful.

GARCIA, Member, concurring and dissenting: I concur with the majority's reversal of the administrative law judge's (ALJ) proposed decision, and I dissent from the majority's ruling on the merits and the remedy ordered by the majority. For the reasons explained below, I would remand the case for further proceedings before an ALJ.

The Board misses here an opportunity to inform the public on two important issues. First, the case of Lane v. I.U.O.E Stationary Engineers (1982) 212 Cal.App.3d 164 [260 Cal.Rptr. 634] (Lane) is not an applicable precedent to cite in any case before the Public Employment Relations Board (PERB). Simply put, it is not a labor law case and represents precedent only on the issues of pleading, demurrer and the standard of care to be employed when measuring liability in implied contract cases.

Although it arose in a labor context, Lane was a breach of contract case in which a member sued his union for negligence in representation. The union was not obliged to represent the member but volunteered to undertake representation. On appeal, the court held that a duty of care could arise when the union assumed representation and then went on to define the standard of care that would apply if the duty arose. The court held that the standard of care, where the duty exists, is to be the same as that applied to fair representation when unions represent members; the representative must act fairly, honestly and in good faith, and must refrain from acting arbitrarily, discriminatorily, or in bad faith. In Lane, the court did not

find that the facts and circumstances created a contract or duty to represent. Instead, the court reversed the decision of the lower court on pleading issues and returned the case.

PERB should make it clear that if the asserted facts and circumstances of Lane were presented to PERB for decision, the case would be dismissed for lack of jurisdiction under the Educational Employment Relations Act section 3541.5(b), since it involved an implied contract between the parties outside the exclusive representative's duties for collective bargaining purposes. However, the facts and circumstances of Lane could be evidence of motivation in an unfair labor practice charge brought by a employee against a union.

That brings me to the second issue. As a practical matter, in cases where a dissident member claims the exclusive representative engages in an unfair labor practice involving reprisal or discrimination, suspicion of the union's motivation more easily emerges after passage through the tests discussed by the author.[1] Again, as a practical matter, the California Union of Safety Employees (CAUSE) may find it more difficult to overcome the shifted burden and rebut a prima facie case.

I would remand this case for further proceeding before an ALJ, since the earlier proceeding was flawed by the reliance on Lane, which led the ALJ to conclude that CAUSE had violated the

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Carlsbad Unified School District (1979) PERB Decision No. 89; Novato Unified School District (1982) PERB Decision No. 210; and California State Employees' Association (O'Connell) (1989) PERB Decision No. 753-H.

duty of fair representation. Instead, the focus should be on whether CAUSE'S refusal to represent Christian John was discriminatory or a reprisal for his exercise of protected activity.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An agency of the State of California

After a hearing in Unfair Practice Case No. S-CO-128-S, Christian John v. California Union of Safety Employees, in which all parties had the right to participate, it has been found that the California Union of Safety Employees (CAUSE) has violated section 3519.5(b) of the Ralph C. Dills Act (Dills Act). CAUSE violated the Dills Act by discriminating against Christian John (John) when it refused to represent him before the State Personnel Board (SPB).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Discriminating against John in retaliation for his exercise of rights guaranteed him by the Dills Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Reimburse John for all reasonable expenses incurred by him for his representation before the SPB.

DATED: _____

CALIFORNIA UNION OF SAFETY EMPLOYEES

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.